

Introduction

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The United Nations exists not merely to preserve the peace but also to make change – even radical change – possible.

– Ralph Bunche, Nobel Lecture (1950)¹

The origins of ICERD

On 21 December 1965, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)² was adopted in the United Nations General Assembly in plenary session by 106 votes to none.³ ICERD was the first international human rights treaty, and the first major piece of international law in the drafting of which the then newly independent States participated and played a leading and decisive role.⁴ The Committee on the Elimination of Racial Discrimination (CERD/the Committee), established under Article 8 from 1970 once the treaty had entered into force, was the first international treaty-monitoring body of its kind.⁵ The provisions governing its establishment and functions were even approved by the Soviet Union and its allies, which

1 Ralph Bunche, 'Some Reflections on Peace in Our Time', Nobel Lecture, 11 December 1950, available at: www.nobelprize.org/nobel_prizes/peace/laureates/1950/bunche-lecture.html.

2 International Convention on the Elimination of All Forms of Racial Discrimination, GA Res. 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), 660 UNT.S. 195, entered into force 4 January 1969.

3 UN Doc. A/PV.1406, GA Res. 2106 A (XX). One State, Mexico, abstained from the vote on the grounds that it objected to the reservations clause in the treaty. It subsequently announced that it was giving its affirmative vote to the Convention.

4 Egon Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination', *International and Comparative Law Quarterly*, 15:4 (1966), 1057.

5 Thomas Buergenthal, 'The UN Human Rights Committee', *Max Planck Yearbook of United Nations Law*, 5 (2001), 341.

had maintained for two decades that machinery of this kind infringed national sovereignty and was contrary to the UN Charter.⁶ Banton notes that it was important to call the monitoring body a ‘committee’, which made it sound ‘less novel and less threatening’,⁷ nomenclature adopted by all subsequent UN treaty-monitoring bodies. As observed by the French delegate at the conclusion of the drafting process, no treaty of equal scope or significance had ever been adopted before.⁸

From its inception, one of the purposes of the United Nations as articulated in Article 1(3) of the 1945 UN Charter was to achieve international cooperation in promoting and encouraging respect for human rights for all ‘without distinction as to race’,⁹ reiterated in Article 2 of the 1948 Universal Declaration of Human Rights (UDHR).¹⁰ The word ‘race’ had not appeared at all in the Covenant of the League of Nations signed in 1919. But the language of racism pervaded this first attempt at internationalism nearly a century ago, with its mandate system operationalised by the Article 22 ‘sacred trust of civilization’ over ‘peoples not yet able to stand by themselves under the strenuous conditions of the modern world’, with ‘the tutelage of such peoples ... entrusted to advanced nations’.¹¹ The UN swept away this rhetoric, ‘the explicit endorsement of racial equality in sharp contrast with the racial underpinnings of the League system’.¹² However the legacy of the League of Nations is not entirely absent from the UN system, and the subsequent ICERD regime. The monitoring mechanisms that CERD would pioneer for the UN treaty system, in particular State reports and a petition process, were core procedures of the League of Nations mandates regime, as well as the apparatus of ‘internationalisation’ centred in Geneva with its ‘interrogations ... often with experts briefed by humanitarian lobbies’.¹³

The UN General Assembly expressed concern about racial discrimination from its earliest sessions, often grouped with religious intolerance, declaring in a 1946 resolution that it is ‘in the higher interests of humanity to put an immediate end to religious and so-called racial

6 Schwelb, ‘The International Convention on the Elimination of All Forms of Racial Discrimination’, 1058.

7 Michael Banton, *The International Politics of Race* (Oxford: Blackwell, 2002), p. 67.

8 UN Doc. A/C.3/SR.1345 (France).

9 Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945.

10 Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810 at 71 (1948).

11 Covenant of the League of Nations, [1919] UKTS 4 (Cmd. 153)/[1920] ATS 1/[1920] ATS 3.

12 Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford: Oxford University Press, 2015), p. 399.

13 Pedersen, *The Guardians*, p. 398 and p. 4.

persecution and discrimination'.¹⁴ The movement towards a specific body of international rules began as a response to a global outbreak of anti-Semitic incidents that took place in the winter of 1959–60, known as the 'swastika epidemic'. It resulted in a resolution from the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities on 'manifestations of ... religious and racial prejudices',¹⁵ and an instrument was proposed in debates that followed. However, in 1962, the Third Committee of the General Assembly decided to split the issues of racial and religious discrimination, resulting in two separate Resolutions calling for the preparation of draft declarations and conventions dealing separately with racial discrimination and religious intolerance.¹⁶ The rationale was driven by political opposition to the inclusion of anti-Semitism as legal recognition of the State of Israel,¹⁷ although Soviet and Eastern European countries also viewed racial discrimination as being significantly more important than religious intolerance.¹⁸ With the decision to separate the instruments, it was understood that the Draft Declaration and Convention on Racial Discrimination would receive priority. The 1963 Declaration on the Elimination of All Forms of Racial Discrimination, which contained eleven articles but no definition of 'racial discrimination', was proclaimed on 20 November 1963.¹⁹ It was followed by the preparation of a Convention of ten articles and a Preamble by the Sub-Commission in January 1964, submitted to the Commission on Human Rights, who adopted the substantive articles. This was in turn submitted to the General Assembly in July 1964, along with a draft article on implementation and the text of an additional article on anti-Semitism

14 United Nations General Assembly, 'Persecution and discrimination', GA res. 103(I) (1946), cited in William A. Schabas, 'Genocide and the International Convention on the Elimination of All Forms of Racial Discrimination', in David Keane and Annapurna Waughray (eds), *50 Years of ICERD: A Living Instrument* (Manchester: Manchester University Press, 2016), Ch. 8.

15 UN Econ. & Soc. Council, Sub-Comm. on the Protection and Promotion of Human Rights, UN Doc. E/CN.4/Sub.2/206 (1960).

16 Preparation of a Draft Declaration and a Draft Convention on the Elimination of All Forms of Racial Discrimination, GA Res. 1780 (XVII), at 32, UN Doc. A/5217 (7 December 1962) and Preparation of a Draft Declaration and a Draft Convention on the Elimination of All Forms of Religious Intolerance, GA res. 1781, at 33, UN Doc. A/5217 (7 December 1962).

17 Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Leiden: A.W. Sijthoff, 1970), p. 82.

18 Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination', 999.

19 GA Res. 1904 (XVIII), at 35 (20 November 1963). The Declaration was adopted in the Third Committee by eighty-nine votes to zero, with seventeen abstentions, which were all the result of objections on the basis of the Declaration's conflict with the right to freedom of expression.

proposed by the United States, and shadowed by a sub-amendment submitted by the USSR.²⁰

The proposed article on anti-Semitism did not enjoy broad support in the Third Committee. Delegates expressed the view that the Convention should be a timeless one, applicable without any qualification to every kind of racial discrimination.²¹ Most believed that it would be inappropriate to single out certain forms of racial discrimination to the exclusion of others.²² A proposal by Greece and Hungary to avoid reference to specific forms of racial discrimination in the draft convention was approved by a large majority and the proposed article on anti-Semitism was excluded.²³ The final text was subsequently adopted in December 1965. By contrast the parallel instrument on religious intolerance was never achieved, with almost twenty years of debates resulting in a non-binding declaration in 1981.²⁴

While the impetus for ICERD may lie in anti-Semitism and the swastika epidemic, its realisation came from the support of many African and Asian States for what was seen as an international statement against apartheid and colonialism.²⁵ This political factor saw a clear connection between racism, and apartheid and colonialism, and it is this aspect that emerged most forcefully from the 1962 decision to split the issues of racial discrimination and religious intolerance. The text of the treaty itself reflects this, and despite the decision taken in the Third Committee not to include in the ICERD any reference to specific forms of racial discrimination, it retained a specific reference to apartheid in Article 3 on the basis that: 'it differed from other forms in that it was the official policy of a State Member of the United Nations'.²⁶ In relation to colonialism, the right of petition was considered an important device in the international trusteeship

20 David Keane, 'Addressing the aggravated meeting points of race and religion', *University of Maryland Law Journal of Race, Religion, Gender and Class*, 6 (2006), 360.

21 UN Gen. Assembly, Third Committee, Summary, UN Doc. A/C.3/SR.1313 (New Zealand).

22 UN Gen. Assembly, Third Committee, Summary, UN Doc. A/C.3/SR.1311 (Ireland).

23 UN Gen. Assembly, Third Committee, Summary, UN Doc. A/C.3/SR.1312.

24 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA res. 36/55, UN Doc. A/RES/36/55 (15 November 1981).

25 Theo Van Boven, 'The petition system under the International Convention on the Elimination of All Forms of Racial Discrimination: A sobering balance sheet', *Max Planck Yearbook of United Nations Law*, 4 (2000), 273.

26 UN Gen. Assembly, Third Committee, Summary, UN Doc. A/C.3/SR.1313. Article 3 reads: 'States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.'

system and its decolonisation procedures, leading to the inclusion of Article 15 ICERD dealing with petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples applies.²⁷ While today Article 15 has lost most of its significance since only a few non-self-governing territories are left, ICERD as a statement against colonialism is still considered the 'logical place' for this right of petition.²⁸ The Preamble to the treaty reads as a combined statement against apartheid and colonialism in its articulation that 'the United Nations has condemned colonialism and all practices of segregation', as well as 'governmental policies based on racial superiority or hatred, such as policies of apartheid'.

Apartheid and colonialism were not the only forces influencing the treaty's drafting. For example, Lovelace Jr. investigates the fourteen-member UN Sub-Commission's January 1964 visit to Atlanta, Georgia, in the United States, suggested by the US member Morris Abram in part in order to persuade the drafters that the city's transition away from Jim Crow laws was possible under a juridical framework which protected the freedom of speech of hate groups as well as civil rights organisations.²⁹ In documenting the visit through a range of sources including local media, and charting the impact of demonstrations by the Student Nonviolent Coordinating Committee, among other civil rights groups, on the Sub-Commission members, Lovelace Jr. argues persuasively that historians of ICERD need to employ a more diverse range of primary and secondary sources to reconstruct the treaty's rich drafting history.³⁰ Additionally the Atlanta experience should have underlined for the Sub-Commission 'the importance of expanding the formal drafting process to include more critical, non-state actors of color ... in understanding how law might be used in diverse areas of the world to end manifestations of racial discrimination'.³¹ This did not occur; Lovelace Jr. points out that the Sub-Commission 'experts' were an all-male body largely representative of the global North, with half of its composition from Europe alone and its agenda dictated by State actors or elite NGOs.³² For example, despite its preoccupation with apartheid, 'the Sub-Commission failed to

27 Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV), 15 UN GAOR Supp. (No. 16) at 66, UN Doc. A/4684 (1961).

28 Van Boven, 'The petition system', 274.

29 Timothy Lovelace Jr., 'Making the world in Atlanta's image: The Student Nonviolent Coordinating Committee, Morris Abram, and the legislative history of the United Nations Race Convention', *Law and History Review*, 32:2 (2014), 401.

30 *Ibid.*, 421.

31 *Ibid.*, 422–3.

32 *Ibid.*, 425.

invite any South African freedom fighters to inform and enrich its discussions of the proposed Convention'.³³ Hence the influence of the global South or black internationalism on the treaty can only be traced by moving beyond the dominant methodological approach of tracking Convention debates in various UN organs, represented in 'internalist' accounts of the treaty's origins.³⁴

In the UN General Assembly, the early perception of ICERD as a cornerstone in the anti-apartheid and anti-colonial struggle led the representative of Ghana, the first former British colony in Africa to achieve independence, to comment following the vote to approve the treaty: 'this was its finest hour'.³⁵ The momentum that turned a resolution on anti-Semitism in 1960 into a binding instrument on racial discrimination in 1965 was driven by the belief that it was a statement to put an immediate end to apartheid, colonialism, and more generally discrimination against 'black' and other 'non-white' persons.³⁶ The initial and to some extent continuing task of CERD would be to convince States parties that the treaty was not only a condemnation of these practices but applied equally to all States parties in their internal affairs, as well as to forms of racial discrimination that were not necessarily based on paradigmatic skin colour prejudices and its manifestations.

To date, the Convention has been ratified by 177 States parties,³⁷ with a further six States signatories. Just fourteen States have failed to engage with the treaty – Brunei Darussalam, the Democratic People's Republic of ['North'] Korea, Malaysia, Myanmar and South Sudan, plus eight Pacific Island Countries, and the Caribbean island of Dominica.³⁸ Of these, the only State that has not signed or ratified ICERD to some extent attributable to a lack of capacity due to size or geography, an isolationist civil and political climate hostile to international engagement, or relative youth, is Malaysia. Indeed, a call from the Human Rights Commission of Malaysia to ratify the instrument highlights how ICERD is 'nearing universal

33 *Ibid.*, 427.

34 *Ibid.*, 388. Lovelace Jr. cites Natan Lerner's 1970 book as an example of such an 'internalist' account, relying solely on debates in UN organs.

35 UN Doc. A/PV.1406, quoted in Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination', 1003.

36 Kevin Boyle and Annaliese Baldaccini, 'International human rights approaches to racism', in S. Fredman (ed.), *Discrimination and Human Rights* (Oxford: Oxford University Press (Academy of European Law), 2001), p. 153.

37 Office of the High Commissioner for Human Rights, 'Status of ratification', available at: <http://indicators.ohchr.org>.

38 The eight Pacific Island countries are Cook Islands, Kiribati, Marshall Islands, Micronesia (Federated States of), Niue, Samoa, Tuvalu and Vanuatu.

acceptance'.³⁹ Thus the first achievement of ICERD in its fifty years must be its current 'near universal' status in terms of States parties, covering approximately 95 per cent of the world's population. As described by CERD, it represents: 'the international community's only tool for combating racial discrimination which is at one and the same time universal in reach, comprehensive in scope, legally binding in character, and equipped with built-in measures of implementation.'⁴⁰

ICERD and CERD

ICERD is a concise instrument by contemporary standards with a relatively small number of operative provisions. Meron highlights deficiencies in the drafting, noting that '[t]he speed with which the Convention was considered and adopted, the robustness of the political forces that pushed its formulation and adoption, and perhaps a certain impatience with the niceties of legal drafting are among the factors that underlie some of the problems'.⁴¹ Yet, while in parts a flawed text, it has proven remarkably effective in realising a shift from a narrow understanding of its scope to a much wider reach and relevance. In the early days, many States simply emphatically denied that any form of racial discrimination existed in their territories.⁴² Of the first forty-five State party reports, only five States admitted there was any racial discrimination occurring, with two of these explaining it was being practised by another State.⁴³ It was also common for States to refer to racial discrimination only as part of their inheritance from the colonial era. CERD issued General Recommendation (GR) 2 in 1972 as a response to the 'express or implied' belief from States that 'racial discrimination does not exist' on their territories, requiring all States parties to submit reports on the measures adopted that give effect to

39 Human Rights Commission of Malaysia (SUHAKAM), 'The Human Rights Commission of Malaysia calls on the Government to accede to the International Convention on the Elimination of All Forms of Racial Discrimination 1969', 21 March 2015, available at: www.suhakam.org.my/wp-content/uploads/2015/04/Press-Release-ICERD-2015-.pdf.

40 33 UN GAOR Supp. (No. 18) at 108, 109, UN Doc. A/33/18 (1978) (statement by the Committee on the Elimination of Racial Discrimination at the World Conference to Combat Racism and Racial Discrimination), quoted in Theodor Meron, 'The meaning and reach of the International Convention on the Elimination of All Forms of Racist Discrimination', *American Journal of International Law*, 79 (1985), 283.

41 *Ibid.*, 309 and 291.

42 Michael Banton, *International Action against Racial Discrimination* (Oxford: Oxford University Press, 1996), p. 106.

43 Banton, *The International Politics of Race*, p. 69.

the provisions of the Convention.⁴⁴ The fulcrum in counteracting this outlook and opening up the treaty to a wide range of groups is the definition of ‘racial discrimination’ in Article 1(1), as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural and any other field of public life.

The five grounds, ‘race, colour, descent, or national or ethnic origin’, serve to distinguish ‘race’ from the broader concept of ‘racial discrimination’. Furthermore the treaty makes no comment on the meaning of ‘race’ itself, an exercise that UNESCO attempted in a series of ultimately contradictory statements on race from 1950 to 1967.⁴⁵ Instead, ICERD contains a legal definition of racial discrimination that does not further define its constituent elements. As Thornberry notes:

it is an obvious point – but easily missed – that the umbrella term for the Convention is ‘racial discrimination’, not race. Thus, racial discrimination is given a stipulative meaning by the Convention: as precisely the five terms set out in Article 1, which means ‘race’ but four other terms as well. It is thus clear that the scope of the Convention is broader than ... notions of race, which in any case may express many usages.⁴⁶

The five terms are a closed group, with no indicative phrase (e.g. ‘such as’) preceding their enumeration. Thus in principle any group that falls under the aegis of the treaty must come under one (or a combination) of the five grounds, although the practice of the Committee is not necessarily to articulate which one. For example its GR 27 on the Roma does not specify where this group fits in the definition of Article 1(1).⁴⁷ In a contemporary setting, certain groups, such as indigenous peoples,⁴⁸ non-citizens including migrants and refugees,⁴⁹

44 CERD, ‘General Recommendation 2 on States’ parties obligations’, UN Doc. A/8718 at 38 (1972).

45 UNESCO, ‘Four Statements on the Race Question’, Com.69/II.27/A (Paris: UNESCO, 1969).

46 Patrick Thornberry, ‘The Convention on the Elimination of Racial Discrimination, indigenous peoples, and caste/descent-based discrimination’, in J. Castellino and N. Walsh (eds), *International Law and Indigenous Peoples* (Leiden: Martinus Nijhoff, 2005), pp. 17–53, at 19.

47 CERD, ‘General Recommendation 27 on Discrimination against Roma’, UN Doc. A/55/18, Annex V at 154 (2000).

48 CERD, ‘General Recommendation 23 on Rights of indigenous peoples’, UN Doc. A/52/18, Annex V at 122 (1997). See also Thornberry, ‘The Convention on the Elimination of Racial Discrimination’.

49 CERD, ‘General Recommendation 30 on Discrimination against non-citizens’, UN Doc. CERD/C/64/Misc.11/rev.3 (2004).

minorities,⁵⁰ or caste groups,⁵¹ none of which may appear obviously to fall under an existing ground or grounds, have been interpreted as coming under the ‘umbrella term’ of racial discrimination. The Committee will at times pinpoint exactly where they fall, as it did in relation to caste groups and the third ground ‘descent’,⁵² but generally prefers simply to treat them as coming within the purview of the treaty without specifying exactly where. The principle of self-identification, expressed in GR 8, means that membership of a particular group for the purposes of Article 1(1) ‘shall, if no justification exists to the contrary, be based upon self-identification’,⁵³ leaving the question to the individual or group themselves (with an option of contestation by the State party concerned, the ‘justification ... to the contrary’).

The difficulty with this approach is that for certain groups it may not be clear whether they do come under the treaty, for example religious groups;⁵⁴ while for others, States parties may oppose their inclusion via CERD interpretation, such as India in relation to caste groups, or Ireland in relation to Travellers.⁵⁵ While there are examples of conflicting views, for the most part States parties do not contest the treaty body’s understanding of which groups form part of their reporting remit. The definition of racial discrimination in Article 1 has been instrumental in furthering the object and purpose of the treaty, namely the elimination of *all forms of* racial discrimination, and its adaptability has been a key aspect in ensuring that ICERD is a ‘living instrument’ continually identifying groups previously excluded, marginalised, or insufficiently protected within the international system.

50 There is no CERD GR on minorities, but for an analysis of the many minority rights aspects to CERD’s work, see David Keane and Joshua Castellino, ‘Is ICERD the de facto minority rights treaty?’ in C. Buckley, A. Donald and P. Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Leiden: Martinus Nijhoff, 2016), pp. 275–95.

51 CERD, ‘General Recommendation 29 on Discrimination based on descent’, UN Doc. A/57/18 at 111 (2002). See also David Keane, *Caste-based Discrimination in International Human Rights Law* (Surrey: Ashgate/Routledge, 2007) and Annapurna Waughray, *Capturing Caste in Law: The Legal Regulation of Caste Discrimination* (Routledge, 2018, forthcoming).

52 GR 29, *ibid*.

53 CERD, ‘General Recommendation 8 on Membership of racial or ethnic groups based on self-identification’, UN Doc. A/45/18 at 79 (1991).

54 See further Jose A. Lindgren Alves, ‘Race and religion in the United Nations Committee on the Elimination of Racial Discrimination’, *University of San Francisco Law Review*, 42 (2007–8), 941–82.

55 For an account of Ireland’s refusal to recognise Irish Travellers as an ethnic group for the purposes of ICERD, see Robbie McVeigh, ‘“Ethnicity denial” and racism: The case of the Government of Ireland against Irish Travellers’, *Translocations*, 2:1 (2007), 90–133.

While the text of the treaty remains static (with no additions via protocols), CERD has been the vehicle for evolution in terms of procedural innovations and interpretation of key terms. Initially from 1970, there was a heavy representation of diplomats on CERD. This assisted in gaining support for the novelty of the State reporting process including examination of reports, but created an environment whereby Committee membership was seen 'as simply one diplomatic duty among others'.⁵⁶ The Cold War impeded the Committee's work in the 1980s, but after the Committee elections in 1988 the atmosphere began to change and '[m]embers could trust one another more'.⁵⁷ From the late 1980s States parties began to see treaty-body membership as calling for persons independent from governments, and the Committee started to succeed in improving many of its procedures. It is also apparent that the Committee benefited from more legal expertise among its membership. The examination of States' reports became more searching, with major advances including the appointment of country rapporteurs, and the issuing of a collective view on a report instead of a summary of what different members had said, which would become known as Concluding Observations (COs).⁵⁸

From 1991, CERD formally decided that while the base for its examination was State reports, members must have access as independent experts to all other available sources of information, including non-governmental sources. CERD also decided it would review implementation of the treaty in the absence of a State report where that report was overdue by five years or more, later extended to a five-year absence or more of an initial report, enabling the Committee to 'take charge of the reporting process instead of simply reacting to incoming reports'.⁵⁹ From 1992, it evolved new early warning and urgent action procedures for more critical instances or patterns of discrimination with the potential for widespread and systematic violations or targeting of groups.⁶⁰ New follow-up procedures from 2005 saw the appointment of rapporteurs for the purpose of ascertaining measures taken by States parties to give effect to the Committee's suggestions and recommendations.⁶¹

56 Banton, *The International Politics of Race*, p. 69.

57 *Ibid.*, p. 71.

58 *Ibid.*

59 *Ibid.*, p. 72.

60 CERD, 'Prevention of Racial Discrimination, including Early Warning and Urgent Procedures', UN Doc. A/48/18 (1993), Annex III and CERD, 'Guidelines for the Early Warning and Urgent Action Procedure', UN Doc. A/62/18 (2007), Annex III.

61 Nathalie Prouvez, 'Committee on the Elimination of Racial Discrimination: Confronting racial discrimination and inequality in the enjoyment of economic, social and cultural rights', in M. Langford (ed.), *Social Rights Jurisprudence*:

Under Article 9(2), CERD may ‘make suggestions and general recommendations based on the examination of the reports’, a phrase that authorises both the COs and GRs of today and additional to the main dialogues, CERD GRs now number thirty-five. These ‘cover a wide area of practical, exegetical and group-oriented themes, integrated into the work of the Committee as it interfaces with States Parties’.⁶²

Alston, in tracing the history of GRs/comments, highlights how they have evolved from a concept of unclear and contested meaning to a tool of fundamental importance in the armoury of international human rights law.⁶³ CERD was the first treaty body to issue GRs, from 1972. These were initially focused on treaty provisions and more technical reporting requirements, but have more recently facilitated the Committee in turning its attention to groups that had received a low priority within the structures of the UN, or were suffering continued marginalisation, such as indigenous peoples, the Roma, caste/descent-based groups, migrants, refugees and other non-citizens, and people of African descent, all of whom have been the subject of a GR. The gender-based dimensions of all aspects of the Committee’s work were recognised in GR 25, marking a more systematic and consistent approach in this cross-cutting area.⁶⁴ The practice of holding ‘thematic discussions’ to inform GRs began in relation to GR 27 and the Roma in 2000, and continued in GR 29 and caste/descent in 2002, and GR 34 and people of African descent in 2011.⁶⁵ It moved away from its group focus in relation to the most recent thematic discussion held on combating racist hate speech, resulting in GR 35 in 2013.⁶⁶

The communications procedure contained in Article 14 has been operative since 1984 but attracted few cases in its first years. It has

Emerging Trends in International and Comparative Law (Cambridge: Cambridge University Press, 2008), p. 538.

62 Patrick Thornberry, ‘Confronting racial discrimination: A CERD perspective’, *Human Rights Law Review*, 5:2 (2005), 246.

63 Philip Alston, ‘The historical origins of “General Comments” in human rights law’, in L. Boisson de Chazournes and V. Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality* (The Hague: Martinus Nijhoff, 2001), 776. The chapter outlines how General Comments have their source in short-lived arrangements for a periodic reporting procedure under the UDHR made in the Commission on Human Rights in the 1950s, re-shaped in a Human Rights Committee debate in 1980 that established a formal framework more attuned to their current understanding (at 769–75).

64 CERD, ‘General Recommendation 25 on Gender-related dimensions of racial discrimination’, UN Doc. A/55/18, Annex V at 152 (2000).

65 CERD, ‘General Recommendation 34 on Racial discrimination against people of African descent’, UN Doc. CERD/C/GC/34 (2011).

66 CERD, ‘General Recommendation 35 on Combating racist hate speech’, UN Doc. CERD/C/GC/35 (2013).

potential for more significant impact as more States parties accept the Committee's competence to receive such communications – currently numbering fifty-four – and the procedure becomes better known. Van Boven, writing in 2000, found that 'Article 14 did more to serve as a break-through and a precedent in connection with other international legal instruments than as an international recourse procedure for victims of racial discrimination'.⁶⁷ In other words its principal impact was in opening the way to more successful communication procedures for other UN treaty bodies. Since then, the increased number of declarations and resulting communications or 'cases' may be changing the overall perception of its efficacy. It has unique features, including the fact that Article 14 explicitly provides for the possibility that groups as well as individuals may initiate a procedure alleging a violation of any of the rights of the Convention.⁶⁸ A second distinct aspect is that CERD is not prevented from considering communications that are being or have been examined under another procedure of international investigation or settlement. It is apparent that more analysis is needed on the communications procedure as it grows in importance, although the OHCHR recently published a first volume of 'selected decisions' of the Committee, presenting thirty-two of the most significant decisions on admissibility and merits.⁶⁹ The inter-State procedure that can be triggered under Article 11 has not been effectively used, in common with other treaties. There have been a number of what Buergenthal terms 'disguised inter-state disputes', in which States complain about other States in their reports under Article 9, but decline to formally access the Article 11 inter-State complaints procedure.⁷⁰

CERD for the most part focuses on building a 'dialogue' with States parties over reporting cycles that have a range of technical requirements. The obligations in the Convention are found in general in Article 2(1), and in more detail in Articles 3 to 7, and the reporting State must detail how it is implementing these provisions. The process is premised on the need for the State party to identify through disaggregated data who the groups are on its territory that fall under the purview of the Convention definition and their position in relation to the enjoyment of the full range of rights. Each dialogue is followed by a set of COs by the Committee that contain elements of praise, statements of concern

67 Van Boven, 'The petition system', 272.

68 *Ibid.*, 274.

69 OHCHR, 'Selected decisions of the Committee on the Elimination of Racial Discrimination: Vol.1' (New York and Geneva: United Nations, 2012), available at: www.ohchr.org/Documents/Publications/CERDSelectedDecisionsVolume1.pdf.

70 Thomas Buergenthal, 'Implementing the UN racial convention', *Texas International Law Journal*, 12 (1977), 211.

and recommendations for further action.⁷¹ These will be informed and supported by reference to relevant GRs which lend authority to Committee pronouncements and guide States in the implementation of the relatively terse COs.

Although a 1960s document, ICERD did not suffer the Cold War bifurcation between civil and political, and economic, social and cultural rights, with its Article 5 containing a non-exhaustive list of civil, political, economic, social and cultural rights comparable in its scope to the 'International Bill of Human Rights'.⁷² The equal status of economic, social and cultural rights is explained by the fact that the obligations of the States parties do not refer to the granting of these rights, but only to admitting no racial discrimination in their enjoyment to the extent that they were guaranteed in the domestic law of the States parties.⁷³ If the elimination of racial discrimination is generally viewed as a civil and political right, which it almost certainly was at the time, the economic, social and cultural rights recognised in the treaty provisions are granted only in the furtherance of that object and purpose. Nevertheless, ICERD is the first international treaty not to separate these 'generations' of rights. In GR 20, CERD noted that Article 5 'assumes the existence and recognition of these rights', and in addition to its civil and political emphases,⁷⁴ it has more recently advanced the understanding of the elimination of racial discrimination in the economic, social and cultural spheres. Prouvez highlights how under Article 5 'the equal enjoyment of economic, social and cultural rights has been a matter of continuing and major concern for the Committee', including labour, housing, health, education, land, language and culture rights, with the 'deplorable socio-economic situation in which many members of these vulnerable groups live', together with the lack of effective remedies for violations of these rights, 'relentlessly stressed by the Committee'.⁷⁵

Overall the priority for CERD in eliminating racial discrimination in the enjoyment of the full range of civil, political, economic, social and cultural rights, is to devise new ways to ensure recommendations have a practical impact, meaning recommendations are increasingly concrete and specific with established procedures for follow-up that require reports on implementation.⁷⁶ This is allied with the Article 6

71 Thornberry, 'Confronting racial discrimination', 244.

72 Buergenthal, 'Implementing the UN racial convention', 209.

73 Boyle and Baldaccini, 'International human rights approaches to racism', p. 153.

74 See Karl Josef Partsch, 'Elimination of racial discrimination in the enjoyment of civil and political rights: A study of Article 5, subparagraphs (a) to (d), of the International Convention on the Elimination of All Forms of Racial Discrimination', *Texas International Law Journal*, 14 (1979), 191.

75 Prouvez, 'Committee on the Elimination of Racial Discrimination', pp. 525–37.

76 *Ibid.*, 537.

direction to assure ‘effective protection and remedies’, supported by GR 26.⁷⁷ Furthermore GR 32 has set out the meaning and scope of special measures under the treaty, governed by Articles 1(4) and 2(2).⁷⁸ It emphasises that special measures for the purposes of ICERD has an ‘autonomous meaning’ to be interpreted in the light of the Convention as a whole, which may differ from domestic usage of the concept in particular States parties.⁷⁹

Understanding CERD’s impact to a given situation or group requires close examination of the dialogue process with an individual State party. In effect, the ‘dialogue’ that CERD advocates is a misnomer, since non-governmental organisations (NGOs) and civil society have become a key third party in its efficacy, with further input and participation from other international bodies and experts in line with wider UN mainstreaming and collaboration. Particularly since the turn of the new millennium, CERD has understood that ‘examination necessitates an active civil society input in order to make a reality of the notion of a “constructive” dialogue: otherwise the “dialogue” could be reduced to a mere page-turning exercise’.⁸⁰ The idea is to ‘encourage civil society to activate this important safety valve for victims of racial discrimination’.⁸¹ In practice it means that all sources of information, including civil society information, are critically and professionally appraised by the Committee before the adoption of COs. In addition to the larger or international NGOs, small or grassroots organisations are encouraged and have made a visible contribution to the Committee’s work, bringing the treaty closer to local activists and issues. Drawing increased NGO participation into the Committee’s work is reflective of the enlargement of CERD’s concerns since its inception in the 1970s, notably in the recognition of new categories of rights-holders, and it has in turn ‘served to provide a legal cutting edge to defend their rights’.⁸²

A living instrument

The notion of an evolutionary or dynamic interpretation of treaties has been applied in international jurisprudence predating the UN human

77 CERD, ‘General Recommendation 26 on The right to seek just and adequate reparation or satisfaction’, UN Doc. A/55/18, Annex V at 153 (2000).

78 CERD, ‘General Recommendation 32 on The meaning and scope of special measures in the ICERD’, UN Doc. CERD/C/GC/32 (2009).

79 *Ibid.*, para. 12.

80 Patrick Thornberry, ‘Preface’, in *ICERD and CERD: A Guide for Civil Society Actors* (Geneva: IMADR, 2011), available at: www.ohchr.org/Documents/HRBodies/CERD/ICERDManual.pdf.

81 *Ibid.*

82 *Ibid.*

rights system,⁸³ but regional and international human rights bodies have formulated this idea through the concept of the human rights treaty as a 'living instrument'. The origin of the phrase is commonly attributed to the European Court of Human Rights (ECtHR), which held in *Tyrer v. United Kingdom* (1978) that the European Convention on Human Rights (ECHR) is a 'living instrument ... [to be] interpreted in the light of present-day conditions'.⁸⁴ Bjorge believes that the phrase was coined by Judge Max Sorenson, in a 1975 report,⁸⁵ three years before the ECtHR first employed it in *Tyrer*.⁸⁶ The concept has been criticised particularly in an ECtHR context, seen in a dissenting opinion in the original *Tyrer* decision up to current accusations of excessive judicial activism or creativity, inconsistent with established principles of treaty interpretation.⁸⁷

Nicolas Bratza, the former President of the ECtHR, observes that Article 31 of the Vienna Convention on the Law of Treaties⁸⁸ requires that treaties be interpreted in good faith and in accordance with the ordinary meaning to be given to its terms, but that those terms are also required to be read 'in their context' which includes the Preamble, and in the light of the treaty's 'object and purpose'. This requires making safeguards practical and effective and of continuing relevance, which led the ECtHR 'to adopt an evolutive and purposive approach to the interpretation of the Convention and thereby breathe life into the words of the instrument so as to make it relevant to contemporary European society'.⁸⁹ This is balanced by ensuring that 'the application of the "living instrument" doctrine is confined within reasonable bounds',⁹⁰ leading to his characterisation of the Court's approach as

83 Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford: Oxford University Press, 2014), p. 10. Bjorge cites the *Spanish Zone of Morocco Claims* arbitral decision from 1925 as one example of evolutionary treaty interpretation outside of, and indeed predating, the international human rights law realm.

84 *Tyrer v. United Kingdom* (1978), 58 ILR 339, 353.

85 Max Sorenson, 'Do the rights set forth in the ECHR in 1950 have the same significance in 1975?', reprinted in *Max Sorenson: A Bibliography* (Aarhus: Aarhus University Press, 1988), p. 23 and pp. 54–5, cited in Bjorge, *The Evolutionary Interpretation of Treaties*, p. 12.

86 Nicolas Bratza writes that while *Tyrer* was the first case in which express reference was made to the phrase, it has its source in the 1958 US Supreme Court decision *Trop v. Dulles* 356 US 86 (1958), which held that: 'the provisions of the [US] Constitution are not time-worn adages or hollow shibboleths. They are vital living principles'. See Nicolas Bratza, 'Living instrument or dead letter: The future of the European Convention on Human Rights', *European Human Rights Law Review*, 2 (2014), 117.

87 See further *ibid.*

88 Vienna Convention on the Law of Treaties, 1155 UNT.S. 331, 8 I.L.M. 679, entered into force 27 January 1980.

89 Bratza, 'Living instrument or dead letter', 118.

90 *Ibid.*, 123.

‘incremental and evolutionary, rather than revolutionary’.⁹¹ Letsas similarly understands evolutionary interpretation under the ECtHR as ‘a process of moral discovery’, where ‘the Court is not expanding or inflating the scope of the ECHR rights by treating the Convention as a living instrument; rather it *discovers* what these human rights always meant to protect’.⁹²

In the regional systems outside Europe, the doctrine has been invoked by the Inter-American Court of Human Rights in a number of decisions, such as *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001) which held that: ‘human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions’.⁹³ The African Commission on Human and Peoples’ Rights recently adopted the living instrument approach to interpret the term ‘peoples’ in the African Charter on Human and People’s Rights to include indigenous peoples, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya* (2009).⁹⁴

Internationally, Schlutter notes that the principle of what she terms ‘dynamic interpretation’ has been adopted by all of the UN treaty bodies.⁹⁵ For example, in *Judge v. Canada* (2003) the Human Rights Committee noted in relation to the International Covenant on Civil and Political Rights: ‘the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.’⁹⁶ In *V.X.N. and H.N. v. Sweden* (2000), the Committee Against Torture considered that the Convention Against Torture ‘as a living instrument, must be interpreted and applied taking into account the circumstances of contemporary society’.⁹⁷ The Chairperson of the Committee on the

91 *Ibid.*

92 George Letsas, ‘The ECHR as a living instrument: Its meaning and legitimacy’, in A. Follesdahl, B. Peters and G. Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge: Cambridge University Press, 2013), 125.

93 *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001), para. 146.

94 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, 276/03 (2009), n.115.

95 Birgit Schlutter, ‘Aspects of human rights interpretation by the UN Treaty bodies’, in H. Keller and G. Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge University Press, 2015), p. 296.

96 *Roger Judge v. Canada*, Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (2003), para. 10.3, cited in Schlutter, ‘Aspects of human rights interpretation’.

97 *V.X.N. and H.N. v. Sweden*, Communications Nos. 130/1999 and 131/1999, UN Doc. CAT/C/24/D/130 and 131/1999 (2000), para. 7.3, cited in Schlutter, ‘Aspects of human rights interpretation’, pp. 296–7.

Elimination of Discrimination Against Women (CEDAW) has written that: 'CEDAW has ensured that the Convention is a living instrument both in substance and procedures',⁹⁸ while CEDAW's GR 25 on special measures states: '[t]he Convention is a dynamic instrument'.⁹⁹ The Committee on the Rights of the Child captures the pan-treaty character of the living instrument doctrine in its General Comment 8, which highlights: 'the Convention, like all human rights instruments, must be regarded as a living instrument, whose interpretation develops over time'.¹⁰⁰

The confluence of the adoption of the living instrument doctrine in regional and international human rights treaties is a result of the special character of human rights instruments, designed to protect the rights of individuals within States parties rather than to create reciprocal rights for the States parties themselves.¹⁰¹ While the UN treaty bodies have expressed their common adherence to this approach, their activation of the doctrine may differ, broadly as a feature of the contrast between the international and regional systems, and more specifically between individual treaty bodies.

Broadly, a clear differentiating feature between the international and regional human rights systems is the preponderance of caselaw within the regional systems. Since the living instrument doctrine has its origins in the judge-made caselaw of the regional systems, specifically Europe, this has been initially mirrored by the international mechanisms in articulating the living instrument doctrine in individual communications. However within international human rights treaty law, the State reporting procedure rather than individual communications is the heart of the monitoring process, and the general recommendations/comments form the doctrinal basis for the State reporting system. Hence it is the Concluding Observations and general recommendations/comments that better reflect the emergence and practice of the living instrument doctrine within international human rights law. Specifically, certain treaty bodies may point more readily to the

98 Dubravka Simonovic, 'Convention on the Elimination of All Forms of Discrimination against Women: Introductory note', Audiovisual Library of International Law, available at: <http://legal.un.org/avl/ha/cedaw/cedaw.html>.

99 CEDAW, 'General Recommendation No. 25 on Article 4, paragraph 1, on temporary special measures', reprinted in *Compilation of General Comments and General Recommendations, adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.7 at 282 (2004), para. 3.

100 CRC, 'General Comment No. 8 on The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment', UN Doc. CRC/C/GC/8 (2006), para. 20.

101 See further Magdalena Sepúlveda Carmona, *Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Cambridge: Intersentia, 2003), pp. 77–8.

individual communications procedure as an expression of the living instrument doctrine, in particular the Human Rights Committee with its advanced and substantive jurisprudence.¹⁰² But in general for the treaty bodies, the optional character of individual communications means they are not recognised by the majority of States parties, and have a distinctly lesser relevance compared to the State reporting procedure. Hence an idea that has become as central to the treaty bodies' work as the living instrument doctrine should not be located primarily within an under-representative individual communications procedure.

In relation to CERD, the living instrument doctrine has been expressly invoked in an individual communication, *Hagan v. Australia* (2003), in which the Committee noted that: 'the Convention, as a living instrument, must be interpreted and applied taking into [account] the circumstances of contemporary society.'¹⁰³ This echoes the origins of the living instrument doctrine in regional human rights caselaw, and the communication is cited by commentators as the 'source' or authority for the living instrument doctrine in ICERD.¹⁰⁴ The facts in *Hagan* relate to a sports stand in Australia, named in the 1960s after a sports personality whose nickname was a racial epithet (although he was neither black nor of aboriginal descent), which the petitioner as an aborigine found objectionable and offensive. The Committee did not find a violation of the treaty, but instead recommended that the offending term be removed from the sign, on the basis that in contemporary society the term was offensive:

[T]he Committee considers that that use and maintenance of the offending term can at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded. The Committee considers, in fact, that the Convention, as a living instrument, must be interpreted and applied taking into [account] the circumstances of contemporary society. In this context, the Committee considers it to be

102 See Jakob Moller and Alfred de Zayas, *The United Nations Human Rights Committee Case Law 1977–2008* (Kehl/Strasbourg: N.P. Engel, 2009).

103 *Stephen Hagan v. Australia* (2003), CERD Communication No. 26/2002, UN Doc. CERD/C/62/D/26/2002, para. 7.3. This sentence contains a typographical error, the missing word 'account', which has to be filled in by commentators using square brackets every time they recall this key phrase as a direct quotation.

104 See Thornberry, 'Confronting racial discrimination', 266, and Bjorge, *The Evolutionary Interpretation of Treaties*, p. 11, both of whom cite *Hagan* when referencing the living instrument doctrine in ICERD. See also Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, 'Mapping State Obligations for Corporate Acts: An Examination of the UN Human Rights Treaty System Report No. 1, ICERD' (United Nations, 2006), which has four paragraphs discussing ICERD as a living instrument and cites *Hagan* as the authority (paras. 102–5).

its duty to recall the increased sensitivities in respect of words such as the offending term appertaining today.¹⁰⁵

This opinion appears to be a misreading of the meaning of the Convention as a living instrument. The decision is not about a term, phrase or provision in the Convention itself; it is about a racial epithet, whose supposed offensiveness may have changed over time. Additionally the term itself was clearly racist and offensive in the 1960s as well as today and it seems strange that the Committee required invoking the living instrument doctrine to justify a contemporary recommendation to have it removed.¹⁰⁶ The doctrine is not about external words that may change over time, but rather the terms or provisions of the instruments themselves that may evolve and find new applications. Nowhere in *Hagan* is there a point about ICERD terms or provisions changing over time, requiring dynamic or evolutive interpretation to render them applicable to the contemporary circumstances in the communication.

The idea of a living instrument has its origins in regional human rights caselaw and so it may seem logical to locate the idea in international human rights law in individual communications, but these may not be reflective of the evolutive approach to international treaty interpretation. More generally in relation to international human rights treaties, and certainly specifically in relation to ICERD, it is the Concluding Observations and general recommendations, rather than the individual communications, that better capture the idea of the treaties as living instruments. While the Concluding Observations are State-specific, the general recommendations provide a treaty-wide and pan-State party overview of its operation and effects and are key to understanding CERD's practice of the living instrument doctrine. CERD has 'shown over time its ability to adapt to and address issues and actors relevant to the contemporary global context',¹⁰⁷ and this may be briefly illustrated by looking at three general recommendations: GR 19 on apartheid; GR 29 on descent; and GR 30 on non-citizens. These evoke different facets of the living instrument doctrine in CERD's workings, through what may be termed affirmative, purposive and contextual readings of ICERD provisions.

105 *Stephen Hagan v. Australia* (2003), para. 7.3.

106 The idea articulated by CERD that the term may not necessarily have been considered offensive and insulting 'for an extended period' in the past begs the question – by whom? In addition to its poor reasoning, the ambiguity of the Committee's decision despite finding in *Hagan's* favour did not assist the fact that it was not complied with. See Remedy Australia, '*Hagan v Australia* (CERD, 2003)', available at: <http://remedy.org.au/cases/15/>.

107 Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, para. 102

Under Article 3 ICERD, 'States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction'. GR 19 on Article 3 reads: 'The reference to apartheid may have been directed exclusively to South Africa, but the article as adopted prohibits all forms of racial segregation in all countries.'¹⁰⁸ Issued in 1995, it may be read as a reaction to the ending of apartheid in South Africa and a re-interpretation of Article 3, with its primary purpose now achieved, as being of relevance to other situations of racial segregation engaging all States parties. The acknowledgement of the narrow drafting intention behind Article 3 is juxtaposed with an interpretive statement that the Committee intends to apply the provisions beyond the parameters of (now defunct) apartheid South Africa. Yet GR 19 does nothing new to the words of Article 3; it simply restates them. This is present in the phrase 'as adopted', in other words, that an ordinary reading of Article 3 'as adopted' clearly indicates that it is a provision that applies to all States parties engaging in practices of this nature. While there may be debate as to whether apartheid is a term of relevance outside South Africa, there can be no disagreement that situations of racial segregation can be global. Nowhere in Article 3 are the words 'South Africa' found, and it involves the composite term 'racial segregation and apartheid', hence GR 19 is not so much an interpretation as an affirmation that a *sui generis* South African interpretation of the meaning of Article 3 is too narrow and not in line with the text itself. This is one expression of the living instrument doctrine; an affirmation of existing terms in reaction to contemporary events or as a statement of renewed Committee intent on a provision.

GR 29 on discrimination based on descent takes a term that did not have any clear meaning at the drafting stage and imbues it with a purpose. Its Preamble reads that 'descent' includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status, thus locating the issue of caste and analogous systems under the rubric of descent-based discrimination. The Preamble to GR 29 references the State reporting process, '[n]oting that the existence of such discrimination has become evident from the Committee's examination of reports of a number of States parties to the Convention'. In this way the challenge faced by the Committee – where to fit caste and analogous systems within the closed definitional grounds in Article 1(1) – is resolved by locating it within the wider and relatively open category of descent. The term

108 CERD, 'General Recommendation 19 on The prevention, prohibition and eradication of racial segregation and apartheid', UN Doc. A/50/18 at 140 (1995), para. 1.

‘descent’ was largely dormant up until this point and thus GR 29 is a reflection of a purposive living instrument doctrine whose task it is, to quote the ECtHR in *Tyrrer*, to ‘breathe life into the words of the instrument’.

GR 30 on non-citizens has been referenced in a UN Special Representative report as a specific example under the heading ‘CERD as a Living Instrument’:

CERD considers it crucial to reflect the actual development of international standards in its interpretation of the Convention, as reflected also by General Recommendation 30 regarding non-citizens. By outlining a wide range of obligations that States have in relation to non-citizens, General Recommendation 30 arguably transcends to a significant extent the limitations contained in Article 1(2).¹⁰⁹

The quote reflects the problem that Article 1(2) ICERD appears to specifically exclude non-citizens from the ambit of the treaty. It reads: ‘This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.’ GR 30 notes in its Preamble that it has become evident from the examination of the reports of States parties to the Convention that groups, including migrants, refugees, asylum-seekers and undocumented non-citizens, ‘constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely’, and as a result:

Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.¹¹⁰

Thus GR 30 is not so much an interpretation as a re-reading of one its provisions, Article 1(2), by reference to the full range of provisions in ICERD and the wider international legal context. It is triggered by reference to information from States parties through the reporting procedure that non-citizens such as the undocumented are clearly a group of concern, with the wider justification of the growing recognition of their rights under the ‘International Bill of Rights’. GR 30 does not employ the phrase ‘living instrument’, but it is a clear reflection of the doctrine in the sense of adopting an evolutive approach to

109 Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, para. 104.

110 CERD, GR 30, Preamble and para. 2.

the treaty's provisions congruent to the context of related provisions within the treaty, and the wider recognition of non-citizens' rights in international human rights law. It affirms that no provision of ICERD can be viewed in isolation.

In fact none of GR 19, GR 29 or GR 30 employ the phrase 'living instrument', although all can be seen as reflecting different expressions of CERD's employment of the doctrine, triggered or justified by information gathered in the State reporting process. Later general recommendations have made such an express reference to the doctrine. Thus GR 32 on special measures reads:

The Convention, as the Committee has observed on many occasions, is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society. This approach makes it imperative to read its text in a context-sensitive manner. The context ... includes, in addition to the full text of the Convention including its title, preamble and operative articles, the range of universal human rights standards on the principles of non-discrimination and special measures. Context-sensitive interpretation also includes taking into account the particular circumstances of States parties without prejudice to the universal quality of the norms of the Convention. The nature of the Convention and the broad scope of its provisions imply that, while the conscientious application of Convention principles will produce variations in outcome among States parties, such variations must be fully justifiable in the light of the principles of the Convention.¹¹¹

The passage underlines the idea that ICERD as a 'living instrument' permeates the Committee's current thinking and is finding more overt expression. Of the different approaches outlined above, the first two, the affirmative and purposive, can be seen as early incarnations of the doctrine, with the contextual approach, implicit in GR 30 and articulated expressly in GR 32, capturing the particular CERD living instrument identity. The '[c]ontext-sensitive interpretation' of GR 32 situates CERD's dialogue with States parties within: (1) the full text of the Convention, including its title, preamble and operative articles; (2) wider international human rights law standards, both treaty-based and Charter-based; and (3) the changing history, politics and experience of the State itself in terms of its Convention groups. The living instrument doctrine also serves to bring the treaty closer to the victims of all forms of racial discrimination, in particular as represented by NGOs. This link is emphasised in the most recent GR 35 (2013): 'By virtue of its work in implementing the

111 CERD, 'General Recommendation 32 on The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination', UN Doc. CERD/C/GC/32 (2009), para. 5.

Convention as a living instrument, the Committee engages with the wider human rights environment, awareness of which suffuses the Convention.¹¹²

Nathalie Prouvez, former Secretary of CERD, notes: ‘the Committee views the Convention as a living instrument’, and continues: ‘The general approach of the Committee to the interpretation of the Convention has been increasingly creative, as can be seen through the ... General Recommendations.’¹¹³ She highlights how the Committee also provides its interpretation of the Convention in the COs, as well as early warning and urgent action procedures, and individual communications,¹¹⁴ and all of these reflect the workings of the doctrine. ICERD is a living instrument in the combination of its mechanisms and work, but this ‘creative’ aspect is perhaps best captured ‘[t]hrough its General Recommendations and Concluding Observations, [where] CERD has elaborated upon the scope of protection of the Convention and demonstrated its continuing relevance and application to contemporary forms of racism suffered by specific groups’.¹¹⁵ It is also reflected in the autonomous meaning and nature of the special measures recommended by CERD.

Through its interpretive approach, CERD, in the past fifty years, has become a node within the UN for minorities, indigenous peoples, and many other groups including those who were previously not covered by any understanding. It is not the only source of regional and international rights for these groups, but it offers a coherent ‘umbrella’ to advance the dialogue between these groups and States parties. It views NGOs and civil society, small and large, as essential to this process. The idea of ICERD as a living instrument drives its evolution. The doctrine was specifically highlighted in the short document marking the treaty’s fiftieth anniversary: ‘Indeed, even after half a decade since its adoption, ICERD continues to remain relevant to the issues that we face today ... The Convention, as a living instrument, must be interpreted and applied taking into account the circumstances of contemporary society.’¹¹⁶ Although certain aspects of a particular CERD understanding of the living instrument doctrine can now be discerned, it continues to evolve.

112 CERD, ‘General Recommendation 35 on Combating racist hate speech’, UN Doc. CERD/C/GC/35 (2013), para. 4.

113 Prouvez, ‘Committee on the Elimination of Racial Discrimination’, p. 517.

114 *Ibid.*, pp. 517–18.

115 *Ibid.*, p. 520.

116 OHCHR, ‘International Convention on the Elimination of All Forms of Racial Discrimination: 50 years of fighting racism’, 26 November 2015, available at: www.ohchr.org/EN/HRBODIES/CERD/50/Pages/Icerd50.aspx.

Chapters summary

Thornberry observes: ‘There is perhaps less written about ICERD than about other “core” UN human rights conventions.’¹¹⁷ This was acknowledged in presentations at the event held in Geneva in November 2015 to mark the fiftieth anniversary, in which Gay McDougall, a former CERD member re-taking a place on the Committee in 2016, stated that CERD needs to be more visible, and speak loudly in corridors where it has not had its voice heard sufficiently thus far. She referred to the need to influence decision-making on development, poverty, and peace and security, and having a voice in New York as well as in Geneva. Through the living instrument doctrine, the instrument has achieved great relevance to a range of groups and this needs to be better communicated. In this vein the current collection seeks to make a contribution to this process in terms of providing a range of contributors and themes, combining current and former CERD members with academics and commentators to provide an overview of the treaty and its contemporary meaning and importance.

Part I: ICERD: cross-cutting themes

Chapter 1, Michael Banton, ‘Extending the Rule of Law’, opens the collection with a *tour d’horizon* of the origins, lifetime and experience of implementing the treaty from the perspective of a CERD member. It argues that the treaty ought to be considered a significant step forward in the extension of the rule of law. The innovations that have been realised by CERD are recognised, documented and placed in their historical and legal contexts, with assessments as to their efficacy. Practical impediments to the realisation of the treaty’s aims, both past and present, inform the discussion, such as past state evasions in budgetary responsibilities. The character of the dialogue that is central to CERD’s operations, and the factors around its emergence and influence on the wider treaty body system, are explored. This chapter, with its bird’s-eye view of CERD both in terms of its legal meaning and scope, and history of operation in time, as well as appreciation of the nuance and practicalities of realising its object and purpose, will serve to bring much needed illumination to the study of CERD and the wider UN treaty bodies. It provides an essential keynote to the collection.

¹¹⁷ Thornberry, ‘Preface’. Thornberry’s book-length commentary on the treaty was published in 2016. See Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford: Oxford University Press, 2016).

Chapter 2, Joshua Clark, 'Knowing and Doing with Numbers: Disaggregated Data in the Work of the Committee on the Elimination of Racial Discrimination', is a lynchpin of the collection and a crucial contribution to the understanding of ICERD on its fiftieth anniversary. Through the issue of disaggregated data collection, Clark tracks the changes in CERD's approach from its early days to contemporary questions, capturing shifts in the Committee's priorities and engagement with States parties. The focus is on the centrality of data to CERD's task in eliminating racial discrimination, but the history of the treaty is also highlighted through this question. At present CERD receives disaggregated data from the vast majority of States, linked to the key concept of special measures, with few exempted from this obligation. However some Committee members' apprehension ensures that CERD does not automatically press for ethno-racial data from every reporting state. It is worthwhile to push States to produce their own indicators if doing so sparks a wider state process, that is, quantification is valuable inasmuch as it mobilizes state action. The burden rests on States to show that producing disaggregated data does more harm than good. Overall the chapter is at once a legal, historical and sociological investigation of the Committee's work, with an eye on the technical nature of realising its mandate.

Chapter 3, Nozipho January-Bardill, 'Racial Discrimination and Gender Justice', represents a CERD member discussion of racial discrimination and gender justice, or the link between the elimination of all forms of racial discrimination and the furtherance of gender justice via the UN treaty system. It does not assume a correlation between the standards of the treaty and practice of CERD, and the protection and promotion of women's rights as members of groups based on race, colour, descent and national or ethnic origin. Indeed, specific initiatives in the region of women's rights which highlighted the intersectional nature of discrimination, specifically world conferences on racism and women in Durban and Beijing respectively that brought together voices from the NGO and activist community as well as professionals, experts and others, have most effectively sought to expose the power relations that underpin the continuing marginalisation of women's voices in a range of spheres. While CERD initially struggled to identify structural discrimination in a similarly effective manner, it has made inroads more recently in aligning itself with identifiable aims of gender justice. The chapter highlights the gains made in GR 25, which mainstreams gender into all aspects of CERD's work and marks a breakthrough for the mandatory inclusion of gender in the State reporting process including disaggregated data requirements. GR 25 further cements a position in the treaty for all women of African descent, women from national and ethnic minority groups, Roma women,

indigenous and migrant women, and women who are non-citizens, among others, with many aspects of the gender dimensions of ICERD still to emerge. Significantly, GR 25 also represents a gain for women on the Committee itself, including black and other non-white voices, and the chapter details some internal struggles in achieving consensus within CERD as to the importance of certain initiatives supporting or realising gender rights. The chapter concludes with the author's shared experience of South Africa and the struggles in moving from a society with deep subordinations on the basis of race and gender to a more inclusive one, both in law and in fact.

Part II: groups and general recommendations

Chapter 4, Jérémie Gilbert, 'CERD's Contribution to the Development of the Rights of Indigenous Peoples under International Law', reviews CERD's engagement with and contribution to indigenous peoples' rights under international law. CERD has been at the forefront of the development of the rights of indigenous peoples and was the first human rights treaty monitoring body to adopt a specific general recommendation on the rights of indigenous peoples, GR 23. The chapter focuses on four aspects of CERD's work on indigenous peoples' rights: tackling structural discrimination; protection of their rights to land and territories; ensuring their access to and control over their natural resources; and the application of the urgent action and early warning procedures. The question of definition is addressed, with many States rejecting CERD's concern with indigenous peoples. In GR 23, CERD affirmed that discrimination against indigenous peoples is racial discrimination falling under the scope of the Convention, and its interpretation and extension of non-discrimination norms from individual to collective rights, treating indigenous peoples as specific category of rights-holders, is innovative. The chapter identifies the early warning and urgent action procedures as one of the most relevant procedural developments for indigenous peoples, particularly in relation to proposed legislation that negatively affects indigenous peoples' rights.

Chapter 5, Claude Cahn, 'CERD and Discrimination Against Roma', provides a chronological account of CERD's engagement with discrimination against Roma and its central contribution to developments which have brought about a fundamentally changed understanding of the Roma as a heterodox set of ethnic groups. The chapter provides a detailed analysis of CERD's GR 27 on discrimination against Roma. In the years since 2000, CERD's approach to discrimination against Roma has been enriched both by its own deepening expertise in the factual matters of Roma exclusion, as well as

by the broadening nature of civil society interventions, and by the growth of State policies and expertise in this area. COs have become more detailed and concrete, as well as in some cases more bold in the expression of discontent with States' actions. In addition, new issues have emerged in the review of States. Also, the Committee has found States in violation of the ICERD treaty within the complaints procedure set out under Article 14. Finally, the Committee has expanded the geographic range of its concerns on Roma beyond Europe. The chapter concludes by noting that CERD has played a key role in moving forward the understanding that anti-Romani sentiment is racism and anti-Romani action is racial discrimination in the sense of ICERD.

Chapter 6, Annapurna Waughray and David Keane, 'CERD and Caste-based Discrimination', examines the emergence of the issue of caste-discrimination in international human rights law, in particular in the 1990s through application of the descent limb in Article 1(1) to caste groups in the context of India's 1996 state report. It charts the emergence of GR 29 (2002) on Article 1(1) (Descent), in which the scope and meaning of descent is examined in greater detail, with a definition of descent-based discrimination as including caste and analogous systems of inherited status. In addition to examining the meaning of caste and the nature of rights violations that occur, the chapter engages with State opposition to CERD's interpretation, in particular from India, which contests the categorisation of caste as a form of descent-based discrimination and therefore a form of racial discrimination. The chapter illustrates that while the Committee considers the treaty to be a living instrument, and may invest meaning in key terms to bring in previously marginalised groups such as those based on caste and descent, States parties may not accept these interpretations. The chapter outlines the importance of the Committee's pioneering work on caste, and argues that despite the CERD–India stalemate, its crucial work on caste will continue given the crucial role of NGOs in the process and the need for a global response for victims of caste discrimination.

Chapter 7, Pastor Murillo and Esther Ojulari, 'General Recommendation 34: A Contribution to the Visibility and Inclusion of Afro-descendants in Latin America', provides an overview of the role of CERD in highlighting and addressing the discrimination suffered by Afro-descendants in Latin America, in a combined CERD member-academic piece. It examines the history of discourses on race in the region which served to hide the particular racial discrimination faced by Afro-descendants. Afro-descendants are a relatively new group in terms of human rights protections; it was the UN World Conference on Racism in Durban Conference in 2001 which served as a catalyst for the emergence of a framework focusing on the rights of Afro-descendants,

contributing to both their greater visibility and protection. During the Durban Review Conference in 2009, CERD proposed the adoption of an international decade on people of African descent. This led first to the proclamation of 2011 as the UN International Year for People of African Descent and later to the UN International Decade for People of African Descent (2015–2024). However CERD has been engaged with Afro-descendants since the 1980s, using Concluding Observations and recommendations to address issues such as structural discrimination, violence, and the importance of collecting statistical data, among others, in relation to Afro-descendants in Latin America. CERD GR 34 (2011) on people of African descent is detailed, including its potential as a stepping-stone towards an International Declaration on the Rights of Afro-descendants.

Part III: conflict and resolution

Chapter 8, William Schabas, ‘Genocide and the ICERD’, investigates CERD’s engagement with the subject of genocide. Although there is no reference to genocide in ICERD, in 1994 CERD raised the problem of ethnic violence in response to Rwanda’s periodic report, examined just ahead of the outbreak of the genocide in that country and prompting the adoption of a Decision expressing concern and alarm over the genocidal loss of life in Rwanda. In 2005 CERD adopted a Declaration on the Prevention of Genocide, and developed a list of indicators relevant to the prevention of genocide, termed ‘indicators of patterns of systematic and massive racial discrimination’. Since then, CERD has focused less on genocide specifically, instead referring to genocide in its outputs on other issues. An exception was in 2014 when it invoked its early warning and urgent action procedures as well as its Declaration on Genocide, in relation to Darfur. The chapter asks why the promise of much greater attention to genocide by CERD that seemed to emerge in 2005 has not been borne out and a number of reasons are suggested. Conclusions are reached on the common thread linking ICERD and the Genocide Convention.

Chapter 9, Cathal Doyle, ‘CERD, the State, Mining Corporations and Indigenous Peoples’ Rights: The Experience of the Subanon in the Philippines’, offers a compelling case study on the operationalization of CERD’s early warning and urgent action procedure in the case of the Subanon community located at the foot of Mt Canatuan in the Philippines, and provides a close-up of the relevance of the treaty on the ground. It constructs the events and the legal consequences of the infringement of an external mining company on the ancestral and sacred lands, and documents the tangle of domestic legal provisions triggered as the Subanon community sought to assert its rights

in the absence of its free, prior and informed consent to the operations. The effectiveness of the CERD procedures form the axle of the piece, as it assesses the necessity for international intervention, why CERD became the focal point for this, and the positive and negative consequences of the Committee's reactions. It further charts the wider relevance of the community's triggering of the CERD procedures, including the creation of networks that are accessing other mechanisms of international human rights law, while not shying from the practical failures to prevent the ultimate destruction of the site. The chapter marks both an illustration of the importance of CERD in highlighting and actioning critical causes for peoples, and the limits to its remedial powers in light of concerted private–public collaboration in subordinating peoples' rights. It ultimately represents a marker of how peoples themselves are contributing to the elaboration of the treaty, and that the old CERD–State party model has given way to a situation where the groups addressed and protected by the treaty are providing the greatest legal analysis of its meaning and reach, often compelled to do so by the critical erosion of their rights.

Chapter 10, Lydia A. Nkansah, 'ICERD in the Post-Conflict Landscape: Towards a Transitional Justice Role', highlights the potential of ICERD to contribute to the process of transitional justice in post-conflict societies. It argues that to date, ICERD has not featured in the range of international and national mechanisms that follow conflict often wrought by ethnic tensions. The treaty has been triggered in a number of relevant situations, including before the ICJ in the Russia–Georgia and DRC–Rwanda cases that involved armed conflict, but the opportunity to assert a role for the treaty was not realised. The analysis engages with what the best role for ICERD might be, including its potential as a contextual element in understanding certain international crimes. In particular it identifies truth commissions as having largely ignored the potential for ICERD as a transitional tool, and calls on CERD, States parties and other actors to better understand and carve out a role for ICERD in the truth and reconciliation process. Through its potential use in truth commissions and beyond, the chapter highlights ICERD's major potential as a post-conflict, transitional justice tool. It offers a vision for the treaty as an important component in rebuilding post-conflict societies, arguing that this role has been overlooked in the discussion on CERD and conflict, suggesting the potential for a general recommendation in this sphere.

Part IV: present and future of ICERD

Chapter 11, Joshua Castellino, 'How Effective has CERD been in Protecting Minorities?', articulates the relationship between the

minority rights discourse and ICERD, and looks forward to a greater understanding of its relevance to minority rights. The author traces the emergence within the UN human rights bodies of a concern with groups and group rights to the work of the Committee in carving out its scope and operations. The argument is that CERD was pioneering in the process of unravelling the rhetoric of general human rights articulated by the emergent United Nations human rights system, setting a trend subsequently replicated by later mechanisms and bodies in the need for *lex specialis* regimes to protect specific categories of individuals who are classifiable as members of a definitive group. The chapter subsequently engages the work of the Committee in a number of areas of importance to minority and indigenous rights. The limits of CERD are also understood, in particular as an instrument that was not oriented initially at minorities or indigenous peoples and the consequent textual checks on its ability to realise these aims, as well as the nature of the process of dialogue undertaken by the Committee. Overall the chapter paints ICERD as a key custodian of minority rights within the UN system, a role which has been under-represented in the literature. It is expected that in the next years and decades, the contribution of CERD to minority rights will become more generally understood.

Chapter 12, Tarlach McGonagle, 'General Recommendation 35 on Combating Racist Hate Speech', outlines how ICERD has traditionally had an outlier status among international human rights treaties in respect of racist hate speech due to its heavy reliance on the criminalisation of certain types of expression in order to combat racism. The recent GR 35 (2013) recognises that ICERD as a living instrument must be better synchronised and informed by contemporary understandings of racist hate speech, its causes, manifestations and impact. The chapter provides an expert assessment of the significance of GR 35, noting that it aligns CERD's approach more closely with those of other international bodies and standards. It furthermore removes the treatment of racist hate speech from the relatively narrow confines of Article 4 ICERD to a more relational approach engaging a range of relevant provisions in the treaty itself, in particular Articles 5 and 7. Hence the chapter emphasises the evolution of the Committee's approach, internally by drawing in a wider range of ICERD provisions, and externally by reflecting and growing interpretations from other treaty bodies. Since GR 35 is both the latest in a series of general recommendations on racist hate speech going back in time, and the most recent of the general recommendations, it very much tracks and represents the changing face of the Committee. The chapter marks a detailed and thought-provoking analysis of a document that reflects the CERD approach today and looking forward.

Chapter 13, Ion Diaconu, 'ICERD: The Next Fifty Years', closes the collection with the views of CERD member Diaconu on the continued and future relevance of ICERD. While racism as an official State policy no longer exists, racial discrimination remains a reality, taking new forms, and in some cases affecting large segments of the population. The constructive dialogue between States parties and CERD has enabled the continued application of the treaty to new and emerging situations and to new forms of racial discrimination. Thus CERD's evolving concerns have emerged as a result of its engagement with States parties and other bodies, notably NGOs, and a number of areas are highlighted as being of particular importance for the future: ensuring the extended application by States of the provision on special measures; insisting that policies and practices adopted by States for the elimination of racial discrimination include the activities of private actors; the dissemination of racist ideas, bearing in mind that CERD has made it clear that criminalization of racism should be reserved for the most serious cases; and Article 5 and the promotion of the full range of civil, political, economic, social and cultural rights without racial discrimination, focusing in particular on vulnerable groups. The Committee should remain alert to new trends and problems, for example the increased significance of cultural identities, and in this it will be assisted by developments in other human rights treaty bodies and UN organisations. The chapter concludes by noting that while the prohibition of racial discrimination will remain as a generally accepted norm of international law, ICERD and the system developed around it provide the detail on how the norm is to be realised on the ground.

In a very brief Conclusion, the editors reflect on the growth in the meaning and reach of ICERD since 1965. CERD has taken what was perceived to be a narrow mandate on apartheid and colonialism and created a near-universal system of innovative protection for a wide range of groups. What emerges in the collected writings is that ICERD is a node for group rights within the UN human rights system, as well as a technical instrument that through its dialogue is acting as a pilot light for States parties to align domestic laws and policies towards the equalisation of the enjoyment of the full range of civil, political, economic, social and cultural rights.